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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MASSACHUSETTS HOSPITAL SCHOOL, et al.,

Petitioners,

v.

RICHARD STOCK, a mentally disabled person, by and through his father and next friend, JOSEPH STOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

This case presents the question that this Court found it unnecessary to resolve in Smith v. Robinson, 104 S. Ct. 3457, 3470 (1984)--"whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983 on a due process challenge."

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No.

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MASSACHUSETTS HOSPITAL SCHOOL, et al.,

Petitioners,

v.

RICHARD STOCK, a mentally disabled person, by and through his father and next friend, JOSEPH STOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

The petitioners request that a writ of certiorari be granted to review the

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1/ The other petitioners are the Massachusetts Department of Education; John Britt, as he is Superintendent of the Massachusetts Hospital School; John Lawson, as he is Commissioner of the Massachusetts Department of Education; Robert Powers, as he is Director of the Bureau of Institutional Schools; and Lorraine Atkins, as she is Program Manager for the Brayton High School at the Massachusetts Hospital School.

opinion and order on rehearing of the Supreme Judicial Court for the Commonwealth of Massachusetts in this case.[2/]

OPINIONS BELOW

The opinion on rehearing of the Supreme Judicial Court for the Commonwealth of Massachusetts, App. 1a-14a, is reported at 394 Mass. 437, 476 N.E.2d 210 (1985). The original opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, App. 15a-41a, is reported at 392 Mass. 205, 467 N.E.2d 448 (1984). The opinion of the Massachusetts Superior Court on summary judgment, App. 45a-52a, is not reported.

2/ The question presented by this petition is also among those presented in the petition for certiorari in Lutjeharms v. Rose, which is presently pending before this Court. No. 84-1534, 53 U.S.L.W. 3718 (U.S. Mar. 15, 1985).

JURISDICTION

The judgment of the Supreme Judicial Court, the highest court of the Commonwealth of Massachusetts, was entered on June 19, 1984. A timely petition for rehearing was allowed on April 8, 1985, and this petition for certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since rights were claimed under the statutes of the United States, which were sustained by the Supreme Judicial Court for the Commonwealth of Massachusetts.

STATUTES INVOLVED

Section 1415 of title 20 of the United States Code provides, in pertinent part:

(b)(1) The procedures required by this section shall include, but shall not be limited to--

* * *

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency . . . .

* * *

(e)(2) Any party aggrieved by the findings and decision made under subsection (b) of this section . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States . . . .

Section 1983 of title 42 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988 of title 42 of the United States Code provides, in pertinent part:

> . . . In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This case was instituted in July 1982 by Richard Stock, a twenty-year-old, multiply handicapped young man, in an attempt to obtain special education services until his twenty-second birthday, even though he had graduated from high school in June 1981,[3/] and neither Stock nor his parents had objected to or sought administrative review of his graduation at the time.

In his Complaint, App. 57a-80a, Stock raised claims under the Massachusetts special education statute, Mass. Gen.

3/ Under the Education of the Handicapped Act (EHA), states are free, within certain limits, to establish the age range for eligibility for special education services. 20 U.S.C. § 1412(2)(B). Under Massachusetts law a special needs child is entitled to receive special education at public expense until he reaches age twenty-two or attains a high school diploma. Mass. Gen. Laws c. 71B, §§ 1 and 3.

Laws c. 71B; the EHA; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the due process provisions of the Fourteenth Amendment to the United States Constitution and of the Declaration of Rights of the Massachusetts Constitution. App. 71a-75a. All of these claims were based on essentially the same factual allegations, i.e., that the defendants failed to provide adequate notice to Stock and his parents of the consequences of and alternatives to graduation; that the defendants failed to give Stock or his parents adequate opportunity to participate in or challenge the graduation decision; and that the issuance of a high school diploma to Stock was substantively inappropriate, given his limited academic skills. App. 57a-58a, 62a-75a.

On February 25, 1983, Stock filed a Motion for Preliminary Injunction seeking to require the Massachusetts Department of Education and its Commissioner to provide or arrange for an appropriate special education program for Stock. That motion was denied, and the denial was affirmed, without opinion, by a single justice of the Massachusetts Appeals Court in an interlocutory appeal, pursuant to Mass. Gen. Laws Ann. c. 231, § 118.

In October 1982, the parties filed cross-motions for summary judgment. On March 29, 1983, the Superior Court granted summary judgment for the defendants on the ground that Stock had failed to exhaust his administrative remedies before seeking judicial review, as required under the EHA. App. 45a-52a.

Stock appealed from the Superior Court's decision to the Massachusetts Appeals Court, the state's intermediate appellate court, and then petitioned for direct appellate review by the Supreme Judicial Court for the Commonwealth of Massachusetts, the state's highest court. That petition was granted on July 26, 1983.

While his appeal was pending, Stock requested an administrative hearing before the Bureau of Special Education Appeals (BSEA).[4/] The BSEA denied that request because Stock had already received a high school diploma and was therefore no longer eligible for special

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4/ The BSEA is the state agency that adjudicates special education appeals pursuant to Mass. Gen. Laws c. 71B, § 3; Mass. Gen. Laws c. 30A, §§ 10, 11; and 20 U.S.C. § 1415(b)(2). See Burlington School Committee v. Department of Education, 85 L. Ed. 2d 385, 390 (1985).

education services and because his two-year delay in requesting a hearing legally barred his administrative appeal and made a hearing administratively unworkable. App. 42a-44a. Stock appealed the BSEA's denial of his request for an administrative hearing to the Superior Court in a separate action, Stock v. Massachusetts Department of Education, Suffolk Superior Court, No. 61786, which was stayed pending the outcome of the present case. That case is still pending in the state trial court.

On June 19, 1984, the Supreme Judicial Court rendered its decision reversing the Superior Court's entry of summary judgment in defendants' favor and remanding the case to the Superior Court with directions that it order the BSEA

to hold a hearing on the matter of providing special education services to the plaintiff. App. 15a-41a. Although the court found that exhaustion of administrative remedies would have been futile in this case, it cautioned that such exceptions to exhaustion requirements are confined to narrow circumstances. App. 36a and n. 14. The court further held that the award of a diploma to Stock was substantively and procedurally deficient under the federal and state special education statutes and that the diploma should therefore be rescinded. App. 33a-34a, 37a, 40a. However, the court declined Stock's invitation to set substantive standards for the attainment of a high school diploma, holding that such standards are "peculiarly within the ex-

pertise of the department and of local educational authorities." App. 37a.

The court based its decision on the EHA and the state special education statute and therefore found it unnecessary to reach Stock's federal and state constitutional claims or his claims under 42 U.S.C. § 1983. App. 34a.

On remand, the Superior Court issued an Order for Judgment, App. 53a-55a, declaring that defendants had violated Stock's procedural and substantive rights under Mass. Gen. Laws c. 71B and the EHA and ordering defendants to rescind Stock's high school diploma and hold a hearing, pursuant to Mass. Gen. Laws c. 71B, § 3, and 20 U.S.C. § 1415(b)(2), on the matter of providing special education services to Stock. The Superior Court retained jurisdiction of the case

"to insure strict compliance with the procedural safeguards specified by [Mass. Gen. Laws] c. 71B, § 3[;] 20 U.S.C. § 1415[;] and 34 C.F.R. §§ 300.500-300.513." App. 55a.

Within ten days after the decision of the Supreme Judicial Court, Stock submitted a petition for rehearing, pursuant to Mass. R. App. P. 27, seeking an award of attorney's fees under 42 U.S.C. § 1988. App. 81a-84a.[5/] Defendants opposed the fee request on the grounds that this Court's decision in the case of Smith v. Robinson, 104 S. Ct. 3457 (1984), rendered shortly after Stock's petition for rehearing was filed, pre-

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5/ Alternatively, Stock sought fees on state statutory and common law grounds. App. 7a.

cluded an award of fees in this case.[6/]

The Supreme Judicial Court granted the petition for rehearing and issued an opinion on April 8, 1985, holding that Stock may recover fees under 42 U.S.C. § 1988. App. 1a-14a. Having resolved that issue in Stock's favor, the court did not consider Stock's alternative state-law based fee claims. App. 7a-8a. It is this decision on Stock's eligibility for attorney's fees that petitioners ask this Court to review.

6/ Although legislation has been introduced in Congress and in the Massachusetts legislature that would effectively overrule Smith v. Robinson (and moot this petition) by expressly providing for attorney's fees in special education cases, no such legislation has been enacted by either body to date. The bills presently pending are H.R. 1523 and S. 415 in the United States Congress and S. 842 in the Massachusetts General Court. Petitioners will bring any subsequently enacted statutes to the Court's immediate attention.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW EXPRESSLY LEFT UNSETTLED BY THIS COURT IN SMITH v. ROBINSON.

This case presents the important federal question left open by this Court in Smith v. Robinson, 104 S. Ct. at 3470: "whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983 on a due process challenge." That unsettled question is squarely presented here, and should now be answered by this Court.

In Smith it was unnecessary for the Court to reach the question of whether fees might ever be awarded in an EHA case based on an independent constitutional due process claim, because it found that

plaintiffs in that case were not entitled to fees for their particular constitutional due process claim. That conclusion was based on the rationale previously articulated in Hensley v. Eckerhart, 461 U.S. 424 (1983), "that a claim for which fees are awarded [must] be reasonably related to the plaintiff's ultimate success." Smith, 104 S. Ct. at 3467. In Smith, the due process claim in question, the alleged partiality of the state hearing officer, "involved entirely separate legal theories and, more important, would have warranted entirely different relief" than the substantive EHA claim on which plaintiffs prevailed. Id. at 3471. Accordingly, the Court concluded "that where . . . petitioners have presented distinctly different claims for

relief, based on different facts and legal theories, and have prevailed only on a non-fee claim,[7/] they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted through § 1983." Id. at 3471 (citing Hensley).

In the present case, unlike in Smith, "Stock's due process claim was based on the same set of facts as to which he prevailed under State law and the EAHCA."

7/ As this Court acknowledged in Smith, it is generally settled that a successful claim under the EHA itself does not give rise to attorney's fees under 42 U.S.C. § 1988. Id. at 3468 n. 11. See also Garrity v. Sununu, 752 F.2d 727, 735 (1st Cir. 1984); Teresa Diane P. v. Alief Independent School District, 744 F.2d 484, 490 (5th Cir. 1984); Department of Education v. Katherine D., 727 F.2d 809, 820 (9th Cir. 1983), cert. denied, 105 S. Ct. 2360 (1985); Powell v. Defore, 699 F.2d 1078, 1082 (11th Cir. 1983); Anderson v. Thompson, 658 F.2d 1205, 1215-17 (7th Cir. 1981).

App. 13a. Therefore, the question left open in Smith--whether a substantial, unaddressed constitutional due process claim that is factually identical to a successful EHA claim may give rise to fees under § 1988--cannot be avoided here. That troublesome question, which has already engendered much litigation with conflicting results,[8/] should now be authoritatively resolved by this Court, both to relieve states and municipalities of the burden of paying attorney's fees in EHA cases, a burden that Congress did not intend to impose, Smith v. Robinson, 104 S. Ct. at 3474,[9/] and,

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8/ See section III, infra.

9/ Cf. Kentucky v. Graham, 53 U.S.L.W. 4966, 4968 (U.S. June 28, 1985) ("Con-

(footnote continued)

perhaps more important, to avoid further litigation on the availability of fees in such cases.10/

II. THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT CONFLICTS WITH THIS COURT'S REASONING IN SMITH v. ROBINSON.

The Supreme Judicial Court's holding that Stock may recover attorney's fees under 42 U.S.C. § 1988 based on his unreached constitutional due process claim,

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(footnote continued)

gress sought to avoid making § 1988 a '"relief fund for lawyers."'") (quoting Hensley, 461 U.S. at 446 (opinion of Brennan, J.).

10/ See Hensley v. Eckerhart, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation."), 442 (opinion of Brennan, J.) (describing attorney's fees litigation as "one of the least socially productive types of litigation imaginable").

which was factually identical to the EHA and state statutory claims on which he prevailed, is directly contrary to this Court's reasoning in Smith. Indeed, the analysis used by the Supreme Judicial Court to reach that result demonstrates a misunderstanding of the Smith rationale.

In Smith, this Court concluded that plaintiffs could not recover attorney's fees under § 1988 based on a substantial, unaddressed equal protection claim that was "virtually identical to their EHA claims." Id. at 3468. The Court's rationale for that conclusion was that "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."

Id. Cf. also Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). The Court further reasoned that where the equal protection claim "added nothing to petitioners' claims under the EHA," and the equal protection claim therefore "had nothing to do with a plaintiff's success," fees should not be awarded on the basis of such claims. Id. at 3468 n. 12 (citing Hensley v. Eckerhart). For those reasons, the Court concluded that "where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause . . ., the EHA [which does not provide for attorney's fees] is the exclusive avenue through which the child and his parents . . . can pursue their claim."

Id. at 3470. Much the same reasoning led the Court to conclude that plaintiffs could not recover fees based on their Rehabilitation Act claim either. Id. at 3472-74. As recognized by the Court of Appeals in Smith, allowing fees under §§ 1983 and 1988 in such situations would mean that, contrary to Congress' intent, "attorneys' fees would become available in almost every case by the mere incantation of section 1983." See Smith v. Cumberland School Committee, 703 F.2d 4, 9 (1st Cir. 1983).

As further recognized by this Court in Smith, it is generally agreed that the EHA itself provides a judicial remedy under § 1415(e)(2) for deprivations of the procedural due process provisions of the EHA, either after exhaustion of administrative remedies or prior thereto

if exhaustion would be futile. Id. at 3470-71 n. 17.[11/] It therefore follows, under the same reasoning applied in Smith to equal protection and § 504 claims, that the judicial remedies afforded by the EHA for violation of its procedural provisions should be exclusive

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11/ Indeed, to conclude that the EHA itself does not afford as comprehensive (and therefore as exclusive) a remedy for procedural as for substantive violations would be directly contrary to this Court's decision in Board of Education v. Rowley, 458 U.S. 176 (1982). In Rowley, the Court's first and most comprehensive interpretation of the EHA as a whole, the Court concluded "that Congress placed every bit as much emphasis upon compliance with procedures" as it did upon the substantive provisions of the EHA, id. at 205-06, and consequently directed the lower courts, in proceedings under § 1415(e)(2), to require, first and foremost, compliance with the EHA's procedural requirements. Id. at 206-07.

of other remedies available under §§ 1983 and 1988. In other words, where, as here, a plaintiff's constitutional due process claims are remediable under the EHA itself, the EHA should be deemed the exclusive federal remedy for redressing such claims.

While the Smith Court found it unnecessary to determine whether an "independent" due process claim might give rise to fees under § 1988, its hypothetical discussion of that question, id. at 3470-71 n. 17, provides no support for an award of fees where the constitutional due process claim is in no way independent of the EHA claim but is, as here, virtually identical to it. App. 13a. Rather, the only circumstance in which the Court indicated that fees might be available on the basis of a constitu-

tional due process claim is where such a claim seeks relief beyond that available under the EHA itself.[12/] Smith, 104 S. Ct. at 3470-71 n. 17.

In the present case, the Supreme Judicial Court, apparently misunderstanding this Court's reasoning in Smith, erroneously concluded that simply because Stock raised a substantial, unaddressed constitutional due process claim, he is entitled to fees under § 1988. App. 14a. As expressly stated by this Court in Smith, that, in itself, is not a sufficient predicate for an award of fees even

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12/ Although the Court did not offer any examples of such claims, it apparently was hypothesizing a situation where, unlike here, a plaintiff claims a constitutional right to more procedural protections, i.e., notice and hearing rights, than those provided by the EHA itself.

if the constitutional claim in question is one that could be raised under § 1983. Smith, 104 S. Ct. at 3471.

More significantly, the Supreme Judicial Court offered little explanation for its resolution of the issue left open in Smith--that Stock's due process claim was cognizable under § 1983, thereby giving rise to fees under § 1988. The only rationale provided for that conclusion is that Stock had to seek judicial relief under the EHA in order to obtain the procedural protections afforded by the act. App. 13a. If that circumstance were sufficient to entitle a prevailing plaintiff to fees, then fees would be available in every case where exhaustion of administrative remedies is excused. Such a result is directly contrary to the principles articulated in Smith. Under those

principles it is immaterial whether a plaintiff is permitted to bring an action under § 1415(e)(2) prior to or after exhaustion of administrative remedies. What matters, under the Smith analysis, is whether a remedy is available under the EHA at all for the claim in question. If so, then the EHA remedy should be deemed exclusive, precluding fees under §§ 1983 and 1988. Since, here, plaintiff succeeded in redressing his procedural claims under the EHA itself, App. 6a, 33a-34a, his constitutional claims were superfluous and no fees should be awarded on the basis of those claims.

III. THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT CONFLICTS WITH THE DECISIONS OF SEVERAL FEDERAL COURTS OF APPEALS.

The Supreme Judicial Court's conclusion--that Stock may recover attorney's fees under § 1988 based on an unreached constitutional due process claim that is factually identical to the EHA claim on which he prevailed--is directly contrary to the decisions of several federal courts of appeals. Both before and after this Court's decision in Smith, several federal courts of appeals have held that where, as here, the constitutional due process claim raised by the plaintiff is factually identical to an EHA claim, and is therefore also cognizable under the EHA, fees cannot be awarded under §§ 1983 and 1988 as a remedy for such a claim.

Smith v. Cumberland School Committee, 703 F.2d at 7, aff'd on other grounds sub nom. Smith v. Robinson, supra; Doe v. Koger, 710 F.2d 1209, 1213 (7th Cir. 1983); Victoria L. v. District School Board, 741 F.2d 369, 372 (11th Cir. 1984); Austin v. Brown Local School District, 746 F.2d 1161, 1166 (6th Cir. 1984), cert. denied, 105 S. Ct. 2114 (1985); see also DeLeon v. Susquehana Community School District, 747 F.2d 149, 150 n. 1 (3rd Cir. 1984) (expressing doubt whether pre-Smith cases recognizing claims under § 1983 in such circumstances are still good law after Smith).

This is not to say that the courts of appeals are themselves unanimous on this question. Rather, at least two federal courts of appeal have reached the same conclusion as the Supreme Judi-

cial Court did here, based on the same fallacious reasoning employed in the present case. Teresa Diane P. v. Alief Independent School District, 744 F.2d at 491; Rose v. Nebraska, 748 F.2d 1258, 1263 (8th Cir. 1984), petition for cert. filed sub nom. Lutjeharms v. Rose, No. 84-1534, 53 U.S.L.W. 3718 (U.S. Mar. 15, 1985). Indeed, one federal court of appeals has rendered two apparently conflicting decisions on this question. Compare Victoria L. v. District School Board, supra, with Manecke v. School Board, No. 84-3507 (11th Cir. June 11, 1985).

In order to eliminate the conflict between the Supreme Judicial Court's decision and those of several federal courts of appeal, as well as to resolve the confusion among the federal courts of appeals themselves, on the issue of

whether attorney's fees may be awarded under § 1988 based on a constitutional due process claim that is also cognizable under the EHA, this Court should grant a writ of certiorari to review the decision of the Supreme Judicial Court in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion on rehearing of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Respectfully submitted,

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Dated: July 8, 1985

APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
No. 3280

RICHARD STOCK vs. MASSACHUSETTS HOSPITAL SCHOOL & others.[1]

Suffolk. December 3, 1984. -- April 8, 1985.

Present: Hennessey, C.J., Liacos, Abrams, Nolan, Lynch & O'Connor, JJ.

CIVIL ACTION commenced in the Superior Court Department on July 23, 1982.

Following review reported in 392 Mass. 205 (1984), the Supreme Judicial

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1/ The Department of Education (department), the Commissioner of Education, the director of the bureau of institutional schools of the division of special education of the Department of Education, the superintendent of the Massachusetts Hospital School, and the program manager of Brayton High School.

Court considered a petition for rehearing.

Richard F. Howard for the plaintiff.

Judith S. Yogman, Assistant Attorney General, for the defendants.

LIACOS, J. The plaintiff, Richard Stock, requests an award of attorney's fees for services rendered on appeal in Stock v. Massachusetts Hosp. School, 392 Mass. 205 (1984) (Stock I), and directions to the Superior Court to assess attorney's fees for other work performed by Stock's attorney in the course of the litigation of this case. Within ten days after the date of the rescript in Stock I, supra, Stock submitted to the full court this request for fees, characterizing his request as a petition for rehearing and complying with the procedures for such a petition. See Mass. R. A. P.

27, 365 Mass. 874 (1974). We have treated Stock's motion as a petition for rehearing.[2/]

2/ According to rule 23 of the Massachusetts Rules of Appellate Procedure, a rescript will issue to the lower court twenty-eight days after its date. A petition for rehearing will stay issuance of the rescript until disposition of the petition, unless otherwise ordered. Mass. R. A. P. 23, as amended, 367 Mass. 921 (1975). In this case, the rescript issued, on the plaintiff's request, even though the petition for rehearing had been filed. See rule 23.

The defendants have filed a motion to dismiss the petition on the ground that we lack appellate jurisdiction after the rescript has issued. They rely on Joyce v. George W. Prescott Publishing Co., 352 Mass. 767 (1967), as the basis of their claim that we have no jurisdiction to consider the plaintiff's petition. We note two points. In Joyce, we stated that "[a]fter the case went to judgment in the Superior Court, the case is no longer subject to the jurisdiction of this court" (emphasis added). Id. To the same effect is Boston v. Santosuosso, 308 Mass. 189, 194 (1941). Second, there is no showing that Stock I has gone to judgment. Indeed, in our order we

(footnote continued)

The facts underlying this controversy are set forth in Stock I, we restate here some of the factual and procedural background. The suit was originally brought by Joseph Stock on behalf of his handicapped child, Richard Stock. The complaint contained seven counts arising under the Assistance for Education of All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401-1461 (1982); G.L. c. 71B; § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982); and the due process protections of the Fourteenth Amendment to the Constitution of the United States and of the Declaration of Rights of the

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(footnote continued)

reversed the summary judgment, ordered further administrative proceedings, and instructed the Superior Court to retain jurisdiction. Stock I, supra at 214-215. Joyce is inapplicable. The motion to dismiss is denied.

Massachusetts Constitution. A judge of the Superior Court ordered the entry of summary judgment in favor of all the defendants and dismissed Stock's complaint, concluding that Stock had not met the "primary jurisdiction" requirement of exhaustion of administrative remedies. Stock appealed that judgment, and we allowed his motion for direct appellate review. After summary judgment, Stock's counsel requested an administrative hearing before the Bureau of Special Education Appeals (Bureau). The Bureau denied that request because Stock had already received a high school diploma and was therefore no longer a "[s]chool age child with special needs," as defined in G.L. c. 71B, § 1, as amended by St. 1978, c. 552, § 18. Stock appealed that denial

of an administrative hearing to the Superior Court in a separate action, Richard Stock vs. Massachusetts Department of Education (Suffolk Superior Court No. 61786), which was stayed pending the outcome of Stock I.

In Stock I we held that the awarding of a high school diploma to Stock, thus terminating his eligibility for special education services, without formal, written notice to his parents of the graduation decision, of their right to involvement in that decision, and of their right to a hearing and administrative review violated State and Federal statutory law. Stock I, supra 212. Furthermore, exhaustion of the administrative process was not required because the record revealed that it would have proved

futile. Id. at 213. Because statutory violations formed the premise for our decision, we did not reach Stock's constitutional claims.

Stock now argues that he is entitled to attorney's fees (1) as a prevailing party in an action brought to enforce a provision of 42 U.S.C. § 1983 (1982),[3/] (2) as an equitable matter because of the defendants' bad faith, (3) as a "private attorney general," and (4) as a party against whom frivolous defenses have been asserted, pursuant to G.L. c. 231, § 6F. We hold that Stock is entitled to attorney's fees pursuant to 42

3/ The Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1982), provides, in part: "In any action or proceeding to enforce a provision of section [ ] . . . 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

U.S.C. § 1988 (1982) and, hence, do not consider his other claims.

The issue of entitlement to fees in special education cases has been addressed recently in Smith v. Robinson, 104 S. Ct. 3457 (1984), though the parties disagree as to the effect of that decision on the instant case. In Smith, supra, the Court considered the extensive administrative process established in EAHCA to protect the rights of handicapped children[4/] and found that EAHCA

4/ Section 1415(b)(1)(C) of 20 U.S.C. requires that the State educational unit provide "written prior notice to the parents . . . whenever such agency or unit -- (i) proposes to initiate or change, or (ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child." The State must also provide parents an opportunity to present complaints and an opportunity for

(footnote continued)

would be rendered ineffective if a plaintiff could choose, instead, simply to go directly to Federal court alleging a constitutional claim. Thus, the Court concluded that "where the [EAHCA] is available to a handicapped child asserting a right to a free appropriate public education, based either on the [EAHCA] or on the Equal Protection Clause of the Fourteenth Amendment, the [EAHCA] is the exclusive avenue through which the child . . . can pursue [his] claim." Id. at 3470. EAHCA does not provide for the

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(footnote continued)

"an impartial due process hearing" by the local agency. 20 U.S.C. § 1415(b)(2). 20 U.S.C. § 1415(b)(1)(E). After such a hearing, the aggrieved party may then obtain an impartial review of the local agency's decision at the State level. 20 U.S.C. § 1415(c). Finally, judicial review is guaranteed to any party aggrieved by the final decision of the State level agency. 20 U.S.C. § 1415(e)(2).

awarding of fees. Construing the intent of Congress under the act, the Court concluded that, when an equal protection claim is brought by a handicapped child seeking the free appropriate public education provided for by EAHCA, it cannot be based on 42 U.S.C. § 1983, and no fee can be awarded.

The Court next turned to a due process challenge brought by the plaintiffs and found it unnecessary to decide "whether the procedural safeguards set out in the [EAHCA] manifest Congress' intent to preclude resort to § 1983 on a due process challenge." Id. The Court distinguished, however, a due process challenge from an equal protection claim, stating: "[U]nlike an independent equal protection claim, maintenance of an independent due process challenge to state

procedures would not be inconsistent with the [EAHCA's] comprehensive scheme. Under either the [EAHCA] or § 1983, a plaintiff would be entitled to bypass the administrative process by obtaining injunctive relief only on a showing that irreparable harm otherwise would result. See Monahan v. Nebraska, 645 F.2d 592, 598-599 (CA8 1981). And, while Congress apparently has determined that local and state agencies should not be burdened with attorney's fees to litigants who succeed, through resort to the procedures outlined in the [EAHCA], in requiring those agencies to provide free schooling, there is no indication that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide

them the process they were constitutionally due." Id. at 3471 n.17.

This discussion in Smith, while dicta, strongly implies that a § 1983 action and a fee award are proper when a plaintiff claims that he is being denied due process, and the purpose of the due process challenge is to compel the agency to afford the process that is constitutionally due. In such an instance, the agency is not exempt from a fee award. See Rose v. Nebraska, 748 F.2d 1258, 1263 (8th Cir. 1984); Teresa Diane P. v. Alief Indep. School Dist., 744 F.2d 484, 491 (5th Cir. 1984).

In Smith, the Court declined to award fees, but only because the due process theory asserted by the plaintiffs was entirely separate from the substantive claim on which they ultimately prevailed.

Here, in contrast, Stock's due process claim was based on the same set of facts as to which he prevailed under State law and EAHCA. It is evident that only through this action was Stock afforded the opportunity to participate in the educational decision-making process envisioned by EAHCA. Furthermore, § 1415(e)(2) of EAHCA provides for access to courts only at the conclusion of the administrative process. 20 U.S.C. § 1415(e)(2)(1982). "'[T]he absence of any prescribed remedy in the [EAHCA] for deprivations occurring prior to a final administrative decision' is a gap that should be filled by section 1983." Blazejewski v. Board of Educ., 599 F. Supp. 975, 978 (W.D.N.Y. 1985), quoting Quackenbush v. Johnson City School Dist., 716 F.2d 141, 148 (2d Cir. 1983).

There can be no serious dispute that Stock is a prevailing party, with a substantial unaddressed constitutional claim. Maher v. Gagne, 448 U.S. 122, 132 (1980). Draper v. Town Clerk of Greenfield, 384 Mass. 444, 452-454 (1981). Accordingly, Stock may recover fees, under 42 U.S.C. § 1988, for work performed in Stock I from commencement of suit through appeal and this rehearing. He may not recover for hearings before the department, which were ordered in Stock I, because the EAHCA process has now been invoked.

The judge in the Superior Court is to determine the appropriate fee award. The plaintiff also is to have the cost of the appeals.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
No. 3280

RICHARD STOCK[1] vs.
MASSACHUSETTS HOSPITAL SCHOOL
& others.[2]

Suffolk. January 10, 1984. --
June 19, 1984.

Present: Hennessey, C.J., Liacos,
Abrams, Nolan & O'Connor, JJ.

CIVIL ACTION commenced in the Superior Court Department on July 23, 1982.

The case was heard by John L. Murphy,

1/ Richard Stock, a physically and mentally disabled person, brings this action through his father and next friend, Joseph Stock.

2/ The other defendants are the Massachusetts Department of Education (department), the Commissioner of Education, the director of the bureau of institutional schools of the division of special education of the Department of Education, the superintendent of the Massachusetts Hospital School, and the program manager of Brayton High School.

Jr., J., on a motion for summary judgment.

The Supreme Judicial Court granted a request for direct appellate review.

Richard F. Howard for the plaintiff.

Judith S. Yogman, Assistant Attorney General, for the defendants.

NOLAN, J. The plaintiff, Richard Stock, has appealed the entry of summary judgment in favor of the defendants in the Superior Court. We allowed Stock's motion for direct appellate review. We hold that allowance of the defendants' motion for summary judgment was error, and we remand the case to the Superior Court.

1. Factual background and prior proceedings. Richard Stock, age 21, suffers from multiple cognitive and motor disa-

bilities which are the result of a brain tumor and chemotherapy-radiation treatments received for that tumor at the age of ten. He also manifests emotional and behavioral difficulties which are concomitant with his physical condition. For the most part, he is confined to a wheelchair. At times he has demonstrated academic abilities ranging from the fourth through the ninth grade level. At the time he was awarded a high school diploma, a psychologist's evaluation indicated that his abilities were consistently below the norm for his age group and were consonant with brain damage.

At the age of fourteen, Stock entered the Massachusetts Hospital School, where he received special education services

at the Brayton High School.[3/] In the fall of 1980, Stock's teachers met to formulate his Individualized Educational Plan (IEP) for the 1980-81 school year.[4/] The teachers intended that

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3/ The Massachusetts Hospital School, operated by the Department of Public Health, is an institution for disabled children. Among its programs is the Brayton High School, located at the hospital. Brayton High School employees are under contract with the Department of Education. The department is the State education agency charged with implementing G.L. c. 71B, concerning children with special needs. G.L. c. 71B, § 2. There must also be compliance with 20 U.S.C. §§ 1401 et seq. (1982), the Assistance for Education of All Handicapped Children Act (EAHCA), in order to qualify the Commonwealth's special education programs for receipt of Federal funds.

4/ The Individualized Education Plan or Program is the backbone for development of special education services under both State and Federal law. Under G.L. c. 71B, § 3, local school committees are charged with diagnosing and evaluating all children with special needs within the school district. Provision is made

(footnote continued)

Stock be graduated at the end of the academic year. Neither Stock nor his par-

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(footnote continued)

in § 3 for the annual evaluation of the child's special needs by a representative of the local school department, a teacher familiar with the child, a physician, a psychologist, a nurse, social worker or guidance counselor, and other medical and educational specialists if necessary. Those evaluating the child must develop a suggested course of special education "best suited to a child's needs, [including] the specific benefits expected from such action." G.L. c. 71B, § 3, eighth par., inserted by St. 1972, c. 766, § 11.

General Laws c. 71B, § 3, mandates that such evaluations be made available to parents. Further, provision is made for hearings by the department in accordance with G.L. c. 30A. Parents may refuse the suggested plan and request a hearing before the department, through the Bureau of Special Education Appeals. Parents may consent to or reject alternative placements suggested there. If the parents reject them, the matter is then referred to the State advisory commission on special education. Parents aggrieved by the commission's decision may then "appeal" to the Superior Court.

(footnote continued)

ents were invited to this meeting. In the early part of the winter of 1981, Stock signed the IEP. The IEP does not show a parental signature.[5/] The IEP does not mention graduation. At no time were his parents provided formal, written

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(footnote continued)

Additionally, under 20 U.S.C. § 1414(a)(5), States must, in order to qualify for Federal educational assistance, provide assurance to Federal authorities that annual individual education programs are developed for each special needs student. The Individualized Education Program is defined in 20 U.S.C. § 1401(19) to include the child's present educational performance, a statement of annual goals and objectives, the services to be provided, the dates of initiation and duration of services, and objective evaluation criteria for annual review of the achievement of educational goals.

5/ We wish to point out that although this case concerns parental involvement in the child's special education services, our decision applies with equal force to a guardian, custodian, or any person or entity responsible for a child in need of special education services.

notice of their right to challenge the IEP or of the procedural avenues open to them to make that challenge.[6/]

6/ General Laws c. 71B, § 3, requires written notice to parents when children are referred from regular education to special education programs. As noted above, § 3 also requires that written evaluations "shall be made available" to parents, and provides for parental rejection of the individualized educational programs, and administrative hearings and appeals concerning the programs.

Although G.L. c. 71B, § 3, is not specific concerning the precise type of notice required to be given parents, the Commonwealth's federally assisted special education programs must comply with the procedural safeguards described in 20 U.S.C. § 1415 to continue to qualify for receipt of Federal funds. 20 U.S.C. § 1415(a).

Most important for this action is the requirement of § 1415(b)(1)(C) that the State educational unit provide "written prior notice to the parents . . . whenever such agency or unit -- (i) proposes to initiate or change, or (ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education

(footnote continued)

Neither were they told that graduation would terminate their son's eligibility for special education services.[7] In June, 1981, Stock was presented with a high school diploma. His eligibility for special education services was thereby terminated.

(Footnote continued)

to the child" (emphasis added). The State must also provide to parents written notice of the administrative review procedures available to them and an opportunity for an impartial due process hearing. 20 U.S.C. § 1415(b)(1)(D) & (b)(2).

7/ General Laws c. 71B, § 1, as amended by St. 1978, c. 552, § 18, defines "[s]chool age child" as "any person of ages three through twenty-one who has not attained a high school diploma or its equivalent." Presumably, one who ceases to be a "[s]chool age child," by reason of receipt of a high school diploma, also ceases to be a "[s]chool age child requiring special education" under G.L. c. 71B, § 1. Provision of additional services beyond graduation or the age limitation is now governed by G.L. c. 71B, §§ 12A-12C, inserted by St. 1983, c. 688.

In the months following graduation, Stock remained at the hospital school. Although the record is unclear as to whether additional special education services were offered to him, or offered and refused, in the time between graduation and the commencement of this action, there is no question that Stock has received no further special education services since his graduation. He has failed to adapt either to sheltered workshop or to independent living settings. At the time appellate briefs were filed, he was hospitalized in a chronic care unit.

In December, 1981, Stock's parents sought legal counsel. In the proceeding below, Stock challenged the award of his diploma on procedural and substantive grounds, alleging violations of both

State and Federal law. The defendants asserted that Stock had failed to exhaust administrative remedies. On March 29, 1983, a judge of the Superior Court issued a memorandum and order on cross-motions for summary judgment. In his memorandum, the judge ruled that Stock could not acquire the academic skills necessary for a regular high school education before reaching age twenty-two, the age at which special education entitlements terminate. The judge then concluded that Stock had not met the "primary jurisdiction" requirement of exhaustion of administrative remedies, ordered the entry of summary judgment in favor of all defendants, and dismissed Stock's complaint.

After judgment, Stock's counsel wrote to the Bureau of Special Education Appeals urging consideration of his client's appeal. The assistant director of the Bureau of Special Education Appeals took the position that, because Stock had received a high school diploma, the bureau no longer had jurisdiction of his case.

On appeal, Stock raises the following issues: (1) whether the defendants' failure to provide notice and procedural protections before terminating special education services violated his rights under State and Federal law; (2) whether presentation of a high school diploma to Stock in the absence of his attaining sufficient skills to warrant such presentation violated his rights under State

and Federal law; and (3) whether the Superior Court judge erred in his conclusion that court proceedings were inappropriate in the absence of exhaustion of administrative remedies. Stock requests a determination from this court that he had not acquired sufficient skills to graduate from high school without his express consent. He requests relief in the form of an order rescinding his diploma and directing the department to arrange for and fund appropriate special education services for him. Further, Stock urges this court to establish procedural and substantive standards for graduation of special needs students.

The defendants argue that the judgment of the Superior Court should be affirmed on the issue of exhaustion of

administrative remedies, and further urge that Stock's complaint be dismissed for failure to join a necessary party under Mass. R. Civ. P. 19(a), 365 Mass. 765 (1974), and for failure to state a claim for which relief can be granted.

For the reasons set forth below, we agree that Stock's graduation was procedurally and substantively defective and that exhaustion of administrative remedies would have been futile in his case. However, because it is inappropriate for this court to arrogate to itself the powers delegated to the department, we decline to establish substantive educational standards.

2. Procedural safeguards. The focus of Stock's argument is that the decision to graduate a child with special education needs is a "change in placement,"

20 U.S.C. § 1415(b)(1)(C)(i), triggering the mandatory procedural safeguards of EAHCA, described in 20 U.S.C. § 1415. The plaintiff cites no judicial discussion of this issue, nor have we found any.[8/] It seems obvious, however, that graduation, because it will cause the

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8/ Termination of special education services by reason of a child's expulsion from school is a "change in placement" requiring the implementation of notice and hearing safeguards. S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), cert. denied, 454 U.S. 1030 (1981). Stuart v. Nappi, 443 F. Supp. 1235, 1242-1243 (D. Conn. 1978). The Federal courts have noted with great concern that, if the result were otherwise, school officials might employ expulsion proceedings to terminate special education services. This would circumvent the express purpose of EAHCA--to provide all special needs children with a free appropriate public education. S-1 v. Turlington, supra at 347-348; Stuart v. Nappi, supra. The result would be all the more insidious if graduation proceedings were employed as a device to circumvent the Federal mandate by prematurely terminating special education services.

termination of a student's participation in special education programs, can hardly be characterized as anything other than a change in placement. This view accords with Federal law, which requires that States qualifying for Federal assistance provide special needs children with "a free appropriate public education." 20 U.S.C. § 1412(1). It also accords with the law of this Commonwealth, which mandates that the department administer special education programs so as "to assure the maximum possible development of a child with special needs." G.L. c. 71B, § 2, as amended by St. 1978, c. 552, § 19. No change in placement seems quite so serious nor as worthy of parental involvement and procedural protections as the termination of placement in special

education programs. Under the Federal scheme, a change in placement requires formal, written notice of the decision to graduate a child, as well as notice of a parent's right to protest that decision, a description of the administrative remedies and procedures to be followed, and a description of any alternative services which may be available. 20 U.S.C. § 1415. To ensure conformity with Federal policy, the State must adhere to these notice and procedural requirements. 20 U.S.C. §§ 1412(5)(A), 1415(a), 1416. This change requires significant parental involvement in the decision making process, as this is contemplated by 20 U.S.C. § 1414(a)(C)(iii), and by G.L. c. 71B, § 3. It is not enough, contrary to the defendants' argument, that Stock's

parents received actual notice of the graduation or that they participated to a limited extent in the transitional planning surrounding the graduation. From all appearances, the Stocks received actual notice of a fait accompli, without any notice that they might challenge the decision.[9/] It is difficult to find justification for permitting a young man with Stock's handicaps to pass through and out of the special education system by virtue of his signature on an IEP -- which did not even mention the graduation decision -- without some evidence that he or his parents were aware of the consequences of doing so and the alterna-

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9/ Children at the Brayton High School were permitted to decline graduation in 1982.

tives available to them.[10] We note that the conduct of which Stock complains was in direct violation of the department's special education regulations.[11]

10/ This is not to suggest that children be excluded from such decisions; the regulatory scheme requires their involvement where appropriate. 603 Code Mass. Regs. § 28, par. 311.4 (1981). In many cases, involvement of the special needs child will be of great assistance in educational planning.

11/ The department's regulations for the implementation of St. 1972, c. 766, The Comprehensive Special Education Law, which were effective on September 1, 1978, provide the following measures designed to ensure parental involvement, including several provisions for written notice. Parents are to be part of the evaluation team meeting to create an IEP. Department of Education Special Education Regulation 311.7, as appearing in 117 Mass. Reg. 1 (1978). Parents must be provided with written notice of referrals to special education evaluation, including notice of the parents' right to be present at all IEP development team meetings. Id. 317.0-317.11. Parents must be provided with written notice of the completed special education evaluation

(footnote continued)

Failure to provide to Stock's parents formal, written notice concerning the graduation decision, failure to provide such notice regarding their rights to involvement in that decision, and failure to notify them as to rights to a hearing

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(footnote continued)

and IEP. Id. 324.0-324.6. This notice must include the option to accept or reject the IEP. Id. 324.4, 325.1(a). Creation of a new IEP must conform to all the requisites of an original IEP; specifically, all parental rights remain the same. Id. 335.4. If a parent rejects an IEP in a timely manner, the school committee must notify the Bureau of Special Education Appeals (Bureau), and the Bureau must in turn notify the parents and the school committee of their rights in the appeal process. Id. 400.1. When a parent fails to accept or reject an IEP, the school committee must also so notify the Bureau, and the Bureau must provide the same notice of appellate rights to the parents and school committee. Id. 400.2. Nothing in the record suggests compliance with these regulations. (Current regulations appear at 603 Code Mass. Regs. § 28.00 [1981].)

and administrative review, violate State and Federal statutory law. As a result, we need not reach the issues raised concerning violation of the due process clause of the Fourteenth Amendment to the United States Constitution, nor claims asserted under 42 U.S.C. § 1983 (1976 & Supp. 1981).[12/]

3. Primary jurisdiction. It is well established that resort to the adminis-

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12/ Because statutory violations, not constitutional claims, form the premise for our decision, we will not discuss the defendants' claim that the plaintiffs have failed to state a cause of action to the extent that that argument is addressed to constitutional claims. Further, we disagree with the defendants' contention that the decision to graduate Stock is nonjusticiable. Although the court is not inclined to set new substantive standards concerning requisites for high school graduation, there is nothing improper in reviewing a specific case to determine whether present standards have been met. We conclude that the plaintiff has stated a cause of action.

trative process is generally a prerequisite to invoking the jurisdiction of a court. East Chop Tennis Club v. MCAD, 364 Mass. 444 (1973). However, the doctrine of primary jurisdiction[13/] is limited by several exceptions. Exhaustion is not required where it would prove futile, or where only questions of law are presented to the court, or where irreparable harm would result if judicial action were delayed by the implementation of the administrative process. See

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13/ Problems of "primary jurisdiction" or "prior resort" in administrative law concern resort to judicial action prior to initiation of any agency proceedings, whereas the doctrine of exhaustion of remedies presupposes a situation where some administrative action has begun. Murphy v. Administrator of the Div. of Personnel Admin., 377 Mass. 217, 220-222 (1979).

Ezratty v. Puerto Rico, 648 F.2d 770, 774-775 n.5 (1st Cir. 1981) (futility); School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 75-76 (1982) (questions of law); Murphy v. Administrator of the Div. of Personnel Admin., 377 Mass. 217, 220-222 (1979) (questions of law). Here, not only were questions of law involved in construing graduation as a "change in placement," but the record reveals that invocation of the administrative procedures was virtually impossible, and thus, of course, futile.[14]

14/ We hasten to caution that these exceptions to the primary jurisdiction requirement in agency proceedings are to be confined to narrow circumstances, as in situations where parental reliance on school authorities is likely to be great, and parental knowledge of administrative procedure likely to be absent. Nothing herein is to be construed as permitting an evasion of the administrative process.

4. Standards. Stock urges this court to set standards for the attainment of a "high school diploma or its equivalent," the achievement of which terminates eligibility for special education services under G.L. c. 71B, §§ 1 & 3. This we cannot do. Academic standards are matters peculiarly within the expertise of the department and of local educational authorities, and are at present regulated. 603 Code Mass. Regs. § 40.00 (1979). It is sufficient that the trial judge found, and the record supports, that Stock would be incapable of attaining, by age twenty-two, sufficient learning and skills to merit the award of a high school diploma under existing standards. From this it follows inescapably that conferring a diploma upon the plain-

tiff at the age of eighteen was substantively inappropriate.

5. Failure to join a necessary party. The defendants argue that this action must be dismissed under Mass. R. Civ. P. 19(a), for failure to join an indispensable party, the King Philip Regional School District, the local educational agency for the district where Richard Stock's parents reside. There exists some question as to which local agency will be responsible, both academically and financially, in assisting Stock.[15/]

15/ This confusion apparently stems from establishing where the plaintiff currently "resides" -- with his parents or at a place of his own -- in order to join the appropriate local agency under 603 Code Mass. Regs. § 28, par. 202.1 (1981). Resolution of this issue is best left for the department at the time the hearing is held. At that time the department will be able to ascertain whether Richard

(footnote continued)

In view of our decision to order the case remanded to the department the question whether a local agency will or which local agency need be joined will be best resolved by the department itself, in construing its own regulations. Additionally, the defendants' assertion of error as to failure to join a local agency is not sufficient to require dismissal of this action either under Mass. R. Civ. P. 19(a), or Mass. R. Civ. P. 21, 365 Mass. 767 (1974).

6. Relief to be granted. In view of our determination that the defendants' failure to adhere to procedural safe-

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(footnote continued)

Stock is residing with his parents or elsewhere in the Commonwealth, and provide notice to the appropriate local agency. Cf. Board of Educ. v. School Comm. of Amesbury, 16 Mass. App. Ct. 508 (1983).

guards rendered exhaustion of administrative remedies futile, the trial judge's entry of summary judgment in favor of the defendants must be reversed. Further, because the award of a diploma was both procedurally and substantively deficient, the diploma must be rescinded. This case is remanded to the Superior Court with directions that it order the department to take jurisdiction and to hold a hearing on the matter of providing special education services to Stock. Should it determine that further services are appropriate, the department shall take into account the period of about three years which has elapsed since the initial graduation in June, 1981. This is to be added to Stock's period of eligibility for special education services. Thus, he may receive such services beyond

the normal termination age of twenty-two, see G.L. c. 71B, § 1, although the department is not necessarily precluded from terminating Stock's special education services on some basis other than age. Finally, the department may consider plans for services to which Stock may be entitled under G.L. c. 71B, §§ 12A-12C, inserted by St. 1983, c. 688. The Superior Court shall retain jurisdiction of the case.

So ordered.

Division of Special Education
The Commonwealth of Massachusetts
Department of Education
1385 Hancock Street
Quincy, Massachusetts 02169

April 19, 1983

Mr. Richard F. Howard
Supervising Attorney
Developmental Disabilities
Law Center, Inc.
294 Washington Street, Suite 840
Boston, MA 02108

Re: Richard Stock

Dear Mr. Howard:

Your request for an immediate hearing and/or order with respect to Richard Stock is denied for the following reasons:

First, Richard Stock has graduated from high school and has been granted a high school diploma. A person who has attained a high school diploma or its equivalent is no longer a "school age child with special needs", as that term

is defined in G.L. c. 71B, s. 1. Accordingly, such a person is not entitled to the procedural protections that G.L. c. 71B and the corresponding federal special education law provide for school age children with special needs, including the right to a hearing before this Bureau.

Second, even if, arguendo, the applicable statutes did not contemplate a complete termination of an individual's right to appeal to the Bureau under these circumstances, I note that Richard graduated from high school in June 1981, nearly two years ago. The statutory framework does not contemplate this Bureau taking jurisdiction in a case requiring it to reach back two full school years. Moreover, such a procedure would be administratively unworkable.

Finally, I note that the Superior Court ordered judgment in favor of each defendant in Stock v. Massachusetts Hospital School, Suffolk C.A. No. 56190 (March 29, 1983). While the summary judgment for defendants rested largely on plaintiff's failure to exhaust administrative remedies, the Court did not order this Bureau to take jurisdiction of the matter.

Sincerely yours,

s/s
Stephen Bardige
Assistant Director
Bureau of Special
Education Appeals

cc: Judith Yogman; Rhoda Schneider; Joseph Stock; Superintendent, Wrentham Public Schools

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK: SS. SUPERIOR COURT
C.A. NO. 56190

RICHARD STOCK

VS.

MASSACHUSETTS HOSPITAL SCHOOL, ET ALS[1/]

MEMORANDUM AND ORDER FOR SUMMARY JUDGMENT

March 29, 1983

The above action was before the court on March 25, 1983 on the plaintiff's Motion for Partial Summary Judgment and on the defendants' Motion for Summary Judgment.

1/ Five other defendants are the Massachusetts Department of Education, the Superintendent of Massachusetts Hospital School, the Commissioner of the Department of Education, the Director of the Bureau of Institutional Schools and the Program Manager for the Brayton High School of the Massachusetts Hospital School.

The plaintiff is a young man of twenty years who is physically and mentally handicapped. Following treatment for a brain tumor ten years ago, he has developed significant deficits in reasoning and short-term memory as well as motivation and behavior problems.

After several years of hospitalization, he entered the Massachusetts Hospital School (MHS) in 1976 at the age of 14. MHS is an institution operated by the Massachusetts Department of Public Health with a school program, called Brayton High School operated jointly by the Department of Public Health and the Department of Education. While at MHS attending Brayton High School, the plaintiff received the special educational services provided for by M.G.L. c. 1713

[sic] (Chapter 766 of the Acts of 1972) and the Education of All Handicapped Children Act, 20 U.S.C. sec. 1401 et seq.

The crux of the plaintiff's complaint filed on July 23, 1972 is to challenge the awarding of a high school diploma to the plaintiff resulting in a termination of special educational services for him. He alleges that certain procedural requirements were not met and that he did not meet the educational requirements for graduation.

The plaintiff has filed extensive briefs both for this Motion for Partial Summary Judgment and an earlier request for injunctive relief. In addition, he has filed a book of exhibits containing psychological and neuropsychological evaluations and recommendations, school transcripts, nine affidavits, teacher

reports, an education plan and other information developed over a period of time relating to his education and training.

It is apparent from a review of the submission that the plaintiff could not acquire the academic learning and achieve the level of a regular high school education before reaching the age of 22 when the special educational services terminate. In fact, for a few years before his graduation in 1981, he was not learning new information or skills.

Both the federal and state special education statutes provide a comprehensive scheme for the administration, administrative and judicial review of special education programs for children and the appropriateness of an individuals [sic] education plan. G.L. c. 71B, p. 3; 20 U.S.C. sec. 1415.

The relevant provisions of the Massachusetts statute and the regulations promulgated thereunder afford a student or his parents a full and fair opportunity to become involved in or challenge the individual education plan of the child. The statute and regulations set forth specific steps to resolve any objections the parents or the child may have with the plan proposed for him. The parent or child can request and receive a hearing before the Massachusetts Bureau of Special Education Appeals. 503 C.M.R. sec. 1401.0404.2. An appeal from the decision of the Bureau is heard by the State Advisory Committee 603 C.M.R. sec. 405.0-407.4 and then to the Superior Court 603 C.M.R. sec. 408.0-411.0.

The specialized knowledge and expertise of the Bureau in the field of special education is clearly demonstrated in the published decisions of the Bureau appearing as Exhibits C and D in the plaintiff's exhibit book. In BSEA case No. 3500, the Bureau retained jurisdiction of the case and required a new education plan to be submitted to the Hearing Officer for his approval within 10 days of the decision.

The long and detailed decision in BSEA case No. 2610, based on over 8 hours of recorded testimony and over 100 pages of documents demonstrate the thoroughness of the review and the propensity of the Bureau to place the educational needs of the student above all else.

There is no question that the matters involved in this case demand the special expertise of the Bureau for resolution.

Unfortunately, neither the plaintiff nor his parents complied with the statutory procedure to appeal whatever decision of the school authorities they thought were inappropriate.

Plaintiff has violated the "primary jurisdiction" of the exhaustion of his administrative remedies by involving the original jurisdiction of this court. He has asked this court to decide the controversy on the merits before taking even the first step towards a proper and available resolution. This he cannot do. Murphy v. Administrator of Division of Personnel Administration, 377 Mass. 217, 220 (1978).

The courts have strictly enforced the exhaustion requirement with respect to claims brought pursuant to the Education for All Handicapped Children Act. E Z Realty [sic] v. Commonwealth of Puerto Rico, 648 F.2d 770 (1st Cir. 1981).

Having failed to exhaust the administrative remedies available to him, the plaintiff cannot go forward with his complaints in this court.

For these reasons, summary judgment for the defendants is appropriate.

ORDER

It is therefore ORDERED that judgment be entered in favor of each defendant.

s/s
John L. Murphy, Jr.
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION NO. 56190

RICHARD STOCK

vs.

MASSACHUSETTS HOSPITAL SCHOOL, MASSACHUSETTS DEPARTMENT OF EDUCATION, COMMISSIONER OF EDUCATION, DIRECTOR OF THE BUREAU OF INSTITUTIONAL SCHOOLS OF THE DIVISION OF SPECIAL EDUCATION OF THE DEPARTMENT OF EDUCATION, SUPERINTENDENT OF THE MASSACHUSETTS HOSPITAL SCHOOL, PROGRAM MANAGER OF THE BRAYTON HIGH SCHOOL

ORDER FOR JUDGMENT

OCTOBER 31, 1984

Pursuant to the rescript of the Supreme Judicial Court dated June 19, 1984, in Stock v. Massachusetts Hospital School, 392 Mass. 205, 215 (1984), it is hereby ordered and adjudged:

1. That the defendants violated the plaintiff's procedural and substantive

Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-40

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MASSACHUSETTS HOSPITAL SCHOOL, et al.,

Petitioners,

v.

RICHARD STOCK, a mentally disabled person, by and through his father and next friend, JOSEPH STOCK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD F. HOWARD
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BEST AVAILABLE COPY

52 pp

QUESTION PRESENTED

May a special education plaintiff, who must resort to judicial relief to force education officials to provide him with the process which he is constitutionally due, be awarded attorney's fees pursuant to 42 U.S.C. § 1988?

LIST OF PARTIES

MASSACHUSETTS HOSPITAL SCHOOL,
MASSACHUSETTS DEPARTMENT OF EDUCATION,
JOHN BRITT, as he is Superintendent
of Massachusetts Hospital School,
JOHN LAWSON, as he is Commissioner of
the Department of Education,
ROBERT POWERS, as he is the Director of
the Bureau of Institutiona Schools,
and LORRAINE ATKIN, as she is Program
Manager for the Brayton High School at
the Massachusetts Hospital School,

Petitioners,

v.

RICHARD STOCK, a mentally disabled person,
by and through his next friend,
JOSEPH STOCK

Respondent.

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A. The question of whether attorney's fees may be available to special education plaintiffs has limited impact, even on the small group of potential special education plaintiffs. 21

B. Enactment of special education attorney's fees legislation by Congress or the Massachusetts legislature is likely to moot the issue of whether fees are available pursuant to § 1988. 23

III. THE SUPREME JUDICIAL COURT DECISION WAS NOT "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257. 27

IV. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE SUPREME JUDICIAL COURT CORRECTLY INTERPRETED AND APPLIED SMITH v. ROBINSON. 31

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A. Smith supports an award of attorney's fees when a special education plaintiff has had to resort to judicial relief to force education officials to provide him the procedural protections that were constitutuionally due. 33

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No. 85-40

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MASSACHUSETTS HOSPITAL SCHOOL, et al.,

Petitioners,

v.

RICHARD STOCK, a mentally disabled person, by and through his father and next friend, JOSEPH STOCK,

Respondent.

ON PETITITON FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT's BRIEF IN OPPOSITION

Respondent Richard Stock respectfully requests that the petition for a writ of certiorari to review the decision of the Supreme Judicial Court of Massachusetts be denied.

STATEMENT OF THE CASE

While respondent is satisfied with much of petitioner's Statement of the Case, a somewhat fuller summary of the decisions of the Massachusetts Supreme Judicial Court in this case is useful to assist consideration of whether further review by this Court would be appropriate.

Richard Stock is a multiply handicapped young man with brain injuries who resided in the Massachusetts Hospital School, an institution of the Massachusetts Department of Public Health, until after his high school graduation in June of 1981. The day school program at the Hospital School is and was in 1981 operated directly by the Massachusetts Department of Education. In its first decision in

this case, Stock v. Massachusetts Hospital School, et al., 392 Mass. 205, 467 N.E.2d 448 (1984) ("Stock I"), the Supreme Judicial Court ("S.J.C.") found that defendants, including Department of Education officials, had violated the procedural protections of state and federal special education statutes, G.L.c. 71B and the Education of All Handicapped Children Act, 20 U.S.C. § 1401 et seq. ("E.A.H.C.A.") by using "graduation" to termin te services to Stock without providing him and his parents with an opportunity to participate in that decision and without providing Stock and his parents with notice of his procedural rights as required by state and federal law. Id., 392 Mass. at 210-12, 467 N.E.2d at 453-4. The Supreme Judicial Court found that:

1. No change of special education services "seems quite so serious and worthy of parental involvement and procedural protections" as termination of services. Id., 392 Mass. at 211, 467 N.E.2d at 453;

2. Use of graduation to prematurely terminate special education services circumvents the express purpose of EAHCA- "to provide all special needs children with a free appropriate education." Id., 392 Mass. at 210, n.8, 467 N.E.2d at 453, n.8;

3. Department of Education officials did not comply with their own regulations regarding procedural protections and parental involvement. Id., 392 Mass. at 212, n.11, 467 N.E.2d at 453-4;

4. Stock's request for an administrative hearing regarding his grad-

uation was refused by the Department of Education, Id., 392 Mass. at 209, 213, 467 N.E.2d at 452, 454;[1]

5. "It is difficult to find justification for" defendants' termination of plaintiff's special education services in the circumstances of this case. Id., 392 Mass. at 211, 467 N.E.2d at 453.

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[1]Stock initially went directly to court and was told that he should have exhausted administrative remedies. See Memorandum and Order for Summary Judgment, in Appendix to Petitioner's Petition for a Writ of Certiorari, (hereinafter "Petitioner's Appendix") 45a-52a. However, when he attempted to invoke the jurisdiction of the Bureau of Special Education Appeals ("B.S.E.A.") of the Department of Education, his request was refused because, inter alia, he had received a diploma and therefore was not a "school-aged child" under the state statute. See letter from B.S.E.A. letter to plaintiff's counsel, Petitioner's Appendix, 42a-44a. The Supreme Judicial Court found that exhaustion was futile in these circumstances. Id., 392 Mass. at 213, 467 N.E.2d at 454.

The Supreme Judicial Court declined to reach plaintiff's constitutional due process claims because it had resolved Stock's claims on statutory grounds. Id., 392 Mass. at 212, 467 N.E.2d at 454. The Court ordered that Stock's diploma be rescinded and that Stock be provided with additional special education services if such services are found to be appropriate. Id., 392 Mass. at 214, 467 N.E.2d at 455. Defendants did not seek review of Stock I.

Soon after the Supreme Judicial Court's decision, plaintiff filed a timely request for an award of attorney's fees, pursuant to 42 U.S.C. § 1988 and on other grounds. See Petitioner's Appendix 81a-84a. In a second opinion, Stock v. Massachusetts Hospital School, 394 Mass. 437, 476 N.E.2d 210 (1985) ("Stock II"), the

Supreme Judicial Court held that fees should be awarded, and remanded the case to Superior Court for a determination of a reasonable fee award. 394 Mass. at 442; 476 N.E.2d at 213.

The Court awarded fees pursuant to 42 U.S.C. § 1988 after an extensive analysis of the implications of this Court's decision in Smith v. Robinson, _____ U.S. _____, 104 S.Ct. 3457 (1984). Stock II, 394 Mass. at 439-441, 476 N.E.2d at 211-13. The Supreme Judicial Court read Smith to prohibit a fee award based on § 1988 when an equal protection claim is the constitutional claim which provides the possible basis for fees, because Congress provided a comprehensive scheme in the E.A.H.C.A. to enforce those equal protection rights and did not include an attorney's fees award.

Id., 394 Mass. at 439-40, 476 N.E.2d at 212. However, the Supreme Judicial Court found that this Court's discussion of due process claims "strongly implies" that fees may be appropriate when procedural protection have been denied and the purpose of the due process challenge is to obtain the process which is constitutionally due. Id., 394 Mass. 437, 476 N.E.2d at 212. The S.J.C. found that Stock was a prevailing party who had substantial unaddressed due process claims, closely related to the statutory claims on which he prevailed. Id. It was on this basis that the case was remanded for an award of fees.[2]

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[2]The Court specifically found that a fee award was not appropriate for any future proceedings before the B.S.E.A., since the administrative scheme had now been invoked. 394 Mass. at 442, 476 N.E.2d at 213.

SUMMARY OF ARGUMENT

Certiorari is not warranted in this case first because there is no conflict among the circuits and state appellate courts on the issue raised by this case. In fact, all courts agree that, unlike equal protection claims, due process claims are not precluded by the E.A.H.C.A.

Even if there were a split among the circuits, the issue presented by this case does not reach the requisite level of importance to justify certiorari because it affects only the very small number of potential litigants who must resort to judicial remedies to gain access to the procedural protections of the E.A.H.C.A. Moreover, state and federal legislation is now pending which would expressly provide

for attorney's fees in special education cases and would effectively moot the petition. Because of the limited number of people affected by this issue and the likelihood that intervening legislation will resolve the this matter, the issue presented by petitioners does not warrant review by this Court.

Furthermore, the decision below was not final within the meaning of 28 U.S.C. § 1257, because issues relating to the determination of what is a "reasonable" attorney's fee, e.g., appropriateness of the requested hourly rate, of the amount of time charged, and of an enhancement factor, have not been decided and have been remanded to the trial court for resolution. It would be premature for this Court to grant certiorari before

these issues of federal law are ripe for review.

Finally, certiorari should not be granted because the Supreme Judicial Court was correct in finding that the E.A.H.C.A. does not preclude a § 1983 due process claim when a special education plaintiff must resort to judicial relief to obtain the procedural protections which are constitutionally due. Every court which has squarely addressed this issue after the Smith decision has agreed with the Supreme Judicial Court that fees may be awarded in such circumstances.

REASONS FOR DECLINING TO GRANT THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR STATE APPELLATE COURTS ON THE ISSUE RAISED BY THIS CASE.

One of the "special and important" reasons which may warrant review on writ of certiorari is that a state court of highest resort has decided a federal question in a way which conflicts with that of other state appellate courts or federal courts of appeals. U.S. Sup. Ct. Rule 17.1(a). Contrary to the assertions of petitioners, see Petition for Writ of Certiorari, 28-30, no such conflict exists in this case.

The issue addressed by the Massachusetts Judicial Court and discussed more fully in Part IV of this brief, is whether this Court's

reasoning and analysis in Smith v. Robinson, ____ U.S. ____, 104 S.Ct. 3457 (1984), of the relationship between the E.A.H.C.A. and 42 U.S.C. § 1988 allows an award of attorney's fees in cases in which a special education plaintiff must resort to judicial relief to force education officials to provide him with the process which is constitutionally due. See Stock, 394 Mass. at 441, 476 N.E.2d at 212. Besides the First Circuit's initial decision in Smith, Smith v. Cumberland School Committee, 703 F.2d at 4 (1st Cir. 1983), the defendants cite two other decisions which purportedly conflict with the Supreme Judicial Court's decision on this issue, Victoria L. v. District School Board, 741 F.2d 369, 372 (11th Cir. 1984) and Austin v. Brown Local

School District, 746 F.2d 1161, 1166 (6th Cir. 1984), and one court of appeals decision "expressing doubt" as to whether pre - Smith decisions relating to fees in special education cases are still good law. DeLeon v. Susquehana Community School District, 747 F.2d 149, 150 n.1 (3rd Cir. 1984). Petition for Certiorari, 29. Each of these cases is addressed in this section.

The First Circuit's decision in Smith v. Cumberland School Committee, supra is not even the law of the case after this Court's decision in Smith v. Robinson, supra. The First Circuit made no attempt to separately consider the relationship of equal protection and due process claims to the E.A.H.C.A., as this Court did. See Smith v. Cumberland School Committee,

703 F.2d at 7-9; Smith v. Robinson, 104 S.Ct. at 3470-71, n.17. The First Circuit is simply not an example of a case which has attempted to interpret and apply this Court's reasoning in Smith relating to due process claims and can in no way be said to "conflict" with the Supreme Judicial Court's Stock II decision.

The Eleventh Circuit decisions are also not in conflict with the Stock II decision. Petitioner cites Victoria L. v. District School Board, 741 F.2d 369 (11th Cir. 1984), but that case specifically points out that Smith does not "preclude a resort to § 1983 in a due process challenge." Id., at 372, citing Smith v. Robinson, ____ U.S. ____, 104 S.Ct. 3470 n.17. As the Eleventh Circuit explains in a more recent case, the reasoning in

Victoria L. in fact supports a finding that a separate due process claim may be brought by a special education plaintiff. Manecke v. School Board of Pinellas County, 762 F.2d 912, 920 (11th Cir. 1985). See Victoria L., 741 F.2d at 372. In Victoria L., after citing footnote 17, the court went on to analyze the plaintiff's procedural claims and found no violation of the E.A.H.C.A. and therefore no violation of due process requirements. Id., at 372-74. In Manecke the Eleventh Circuit, based on an analysis of Smith, found that the dismissal of a special education plaintiff's § 1983 due process claim was improper and remanded for further proceedings. Manecke, 762 F.2d at 917-921. See discussion infra; pp. 31 - 32. The Eleventh Circuit

decisions are not in conflict with the Supreme Judicial Court's decision and instead expressly support the Supreme Judicial Court's reasoning that a separate due process claim is not inconsistent with the E.A.H.C.A.'s comprehensive scheme.

In Austin v. Brown Local School District, 746 F.2d 1161 (6th Cir. 1984), the Sixth Circuit also noted that Smith requires due process claims to be treated differently from equal protection claims. Id., 746 F.2d at 1165-6. However, the court goes on to find that the Austin plaintiffs made no separate due process claim in their complaint and therefore the court had no occasion to determine appropriateness of such a claim in that case. Id., 746 F.2d at 1166. Indeed, since the Austin plaintiff's arguable due

process claim was one of "substantive" due process, Id. at 1165, it probably would not have come with exception for procedural due process claims allowed by Smith. See discussion, infra at 31 - 38. Austin is not in conflict with Stock II.

Finally, in DeLeon v. Susquehanna Community School District, 747 F.2d 149 (3rd Cir. 1984), the Third Circuit expressly does not decide what § 1983 remedies may be available after Smith, Id. at 150 n.1 and does not address at all this Court's distinction between due process and equal protection claims in Smith. Indeed, the court had no occasion to address the distinctions between due process and equal protection claims since it found that no procedural violations occurred in

this case. Id. at 154. DeLeon is not inconsistent with the Stock II decision.

Far from being a conflict among the circuits and state appellate courts, the cases cited by defendants are consistent with the reasoning of the Massachusetts Supreme Judicial Court in Stock II. These cases and others discussed infra, have holdings which support that of the Supreme Judicial Court. There is no conflict among the lower appellate courts and certiorari is not warranted.

II. THE QUESTION PRESENTED DOES NOT WARRANT A GRANT OF CERTIORARI BECAUSE OF THE LIMITED IMPORTANCE OF THE ISSUE AND BECAUSE OF THE LIKELY ENACTMENT OF STATE AND FEDERAL LEGISLATION AUTHORIZING ATTORNEYS FEES IN SPECIAL EDUCATION PROCEEDINGS.

The grant of a writ of certiorari is purely discretionary, Hicks v. Miranda, 422 U.S. 332, 344 (1975), and is only granted when important issues of federal law are presented which warrant resolution by this Court. Rule 17, U.S. Sup. Ct. Rules. See U.S. v. Oregon, 366 U.S. 643, 645 (1961); Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 499 (1956); Rice v. Sioux City Memorial Parks Cemetery, 349 U.S. 70 (1955). The issue presented by defendants' petition does not rise to the requisite level of importance both because of the limited impact of this issue on a very limited number of people involved in E.A.H.C.A. liti-

gation, and because state or federal attorney's fees legislation is likely to be enacted which will resolve this issue without further Court involvement.

A. The question of whether attorney's fees may be available to special education plaintiffs has limited impact, even on the small group of potential special education plaintiffs.

The question presented in defendants' petition relates only to attorney's fees for successful litigation of claims relating to denial of procedural due process. See discussion, infra. The issue has little, if any, impact outside the special education area, only affects those few students and parents who go beyond the administrative hearing level to court review,[3] and

[3]The Massachusetts Department of Education estimates that a total of 12 special education cases are taken to court by parents or school officials each year. This estimate may be high.

of those, only affects those who prevail on claims relating to procedural due process. While respondent has no statistical study of the cases, it is his counsel's experience and observation in litigating special education cases and reading special education case law, that the vast majority of special education cases which reach the courts involve exclusively or nearly exclusively issues relating to the substantive appropriateness of particular special education services, the type of claims for which this Court foreclosed fee awards under § 1988, see Smith, 104 S.Ct. at 3469-70. Some cases may have minor related procedural claims, but many of those will be ones, which, like the claims raised by the plaintiffs in Smith, do not warrant a fee award, because the due process claims were

unrelated to the claims on which plaintiffs were successful. See Smith, 104 S.Ct. at 3470-71. It is the rare case that, like Stock, relates exclusively to denial of constitutional and statutory procedural protections. Because the issue is so discrete and relates to such a small category of cases, it does not warrant review by this Court.

B. Enactment of special education attorney's fees legislation by Congress or the Massachusetts legislature is likely to moot the issue of whether fees are available pursuant to § 1988.

There are bills proceeding through both Congress and the Massachusetts General Court which would eliminate the need to resolve the issue raised by petitioners. Senate 842, an Act Providing for Equal Access to Certain Special Education Proceedings, was introduced in this year in the Massachusetts legislature by the Senate Chair-

man of the Committee on Education. The bill would allow special education a plaintiff who prevails in either administrative or judicial proceedings to receive an award attorney's fees and costs associated with that appeal.[4]

---

[4]S. 842 provides:

> Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:
>
> SECTION 1. Section 1N of Chapter 15 of the General Laws is hereby amended by adding at the end thereof the following sentences: --
>
> Such Bureau shall award to the parents, guardians or persons with custody of such child or children their reasonable fees for representation (at a rate not to exceed seventy-five dollars per hour), costs and expenses to be paid to them by the school committee where the Bureau or the State Advisory Commission finds that such fees, costs and expenses have been incurred by reason of such school committee's failure or refusal to prepare, adopt or implement an education plan which is in compliance with the requirements of Chapter 71B

(footnote continued)

The bill has received a favorable report

(footnote continued from preceding page)

or applicable federal law. The Commonwealth shall reimburse each city or town one hundred percent of the cost imposed by the preceding sentence.

SECTION 2. Section 3 of Chapter 71B of the General Laws is hereby amended by inserting at the end thereof the following new paragraph: --

The court, including a federal court, in any proceeding brought pursuant to this section or in any appeal under Chapter 30A of a decision or action rendered pursuant to this section or sections 1M or 1Q of Chapter 15 of in any action based on a claim that a school committee has fialed or refused to prepare, adopt or implement an education plan which is in compliance with the requirements of this chapter or applicable federal law shall order a school committee to pay to the parents, guardians or persons with custody of a child their reasonable fees for representation (at a rate not to exceed seventy-five dollars per hour), costs and expenses incurred in connection with their successful prosecution or defense of such proceeding, including any such fees, costs or expenses incurred in connection with administrative proceedings. The Commonwealth shall reimburse each city and town one hundred percent of the costs imposed by this paragraph.

from the Joint Committee on Education and awaits action by the Senate Committee on Ways and Means.

Similar legislation has also been filed in Congress. H.R. 1523 and S.415 would expressly provide for attorney's fees in special education cases. S.415 has been passed by the United States Senate with support from the administration.

Enactment of either the state or federal legislation would effectively moot this petition. Even if the narrow issue raised by defendants warrants an authoritative resolution by this Court at some later date, it would be prudent to defer that consideration until Congress and the Massachusetts General Court have had an opportunity to decide whether or not to enact their own resolution of the whole issue of attorney's fees in special education cases.

Because the issue raised by defendants affects such a small category of cases and is likely to be resolved by intervening legislation, it is not of sufficient importance to warrant a grant of the Petition for Certiorari.

III. THE SUPREME JUDICIAL COURT DECISION WAS NOT "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257.

For review by this Court to be proper, the decision of the Supreme Judicial Court must be final. 28 U.S.C. § 1257. In this case, the Supreme Judicial Court's decision was not final because it has remanded the case for further proceedings which will address application of 42 U.S.C. § 1988 to the facts of this case.

The finality requirement is "not one of those technicalities to be easily scorned, [but an] important factor in

the smooth working of our federal system." Radio Station WOW v. Johnson 326 U.S. 120, 124 (1945) (Justice Frankfurter); see also North Dakota Pharmacy Board v. Snyder Stores, 414 U.S. 156, 160 (1973). When review of a state court decision is at issue, the rule derives added force because there exists potential conflict between the courts of two different governments. North Dakota Pharmacy Board, 414 U.S. at 159; Radio Station WOW, 326 U.S. at 124. Most importantly, the rule avoids piecemeal litigation. North Dakota Pharmacy Board, 414 U.S. at 159; see also Flynt v. Ohio, 451 U.S. 619, 621, (1981).

In some circumstances this Court has taken a more pragmatic approach to the finality issue, even when further state court proceedings are required,

such as when the results of the proceedings are preordained or ministerial or when the further proceedings could not remotely give rise to further federal questions. Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 479-80 (1975). However, the circumstances of this case do not fit into those exceptions.

Although the Supreme Judicial Court has decided that plaintiff is entitled to a fee award, the Court remanded the case to Superior Court for a determination of the amount of the award. Stock II, 394 Mass. at 441-2, 476 N.E.2d at 213. Thus the posture of this case is similar to the eminent domain cases, where the further proceedings address federal issues of "just compensation," an integral part of the federal question which may eventually require Supreme Court review.

See Grays Harbor Co. v. Coats-Fordney Co. , 243 U.S. 251, 256 (1917). See also North Dakota Pharmacy Board, 414 U.S. at 163. On remand from the Supreme Judicial Court the Superior Court will be required to determine what is a "reasonable" attorney's fee under 42 U.S.C. § 1988, using factors such as those discussed in Blum v. Stenson, 104 S. Ct. 1541 (1984). Questions are likely to arise regarding whether the claimed rate and number of hours are reasonable, see Blum, 104 S. Ct. at 1458, and whether an "enhancement factor" is warranted under the standard set by Blum, 104 S. Ct. at 1548-50. Taking this case for review before these additional federal issues are ripe for review would be likely to result in piecemeal litigation inconsistent with the policy represented by

the finality requirement of 28 U.S.C. § 1257. See Flynt, 451 U.S. at 4921; North Dakota Pharmacy Board, 414 U.S. at 159-60. The lack of finality of the Supreme Judicial Court is another reason that the writ should be denied.

IV. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE SUPREME JUDICIAL COURT CORRECTLY INTERPRETED AND APPLIED SMITH v. ROBINSON.

After careful analysis of this Court's decision in Smith v. Robinson, 104 S. Ct. 3457 (1984) and with the benefit of the same arguments made in defendants' Petition for Certiorari as well as the circuit court decisions in Rose v. Nebraska, 748 F.2d 1258, 1263 (8th Cir. 1984), petition for cert. filed sub nom. Lutjeharms v. Rose No. 84-1534, 53 U.S.L.W. 3718 (March 15, 1985) and Teresa Diane P. v. Alief

Independent School District, 744 F.2d 484, 491 (5th Cir. 1984), the Massachusetts Supreme Judicial Court found that Smith "strongly implies" that education agencies are not exempt from § 1988 fee award when a special education plaintiff must resort to judicial relief to obtain procedural protections which are constitutionally due. Stock II, 394 Mass. at 441, 476 N.E.2d at 212. This conclusion was correct and is supported by every Court which has squarely addressed the issue. See Rose, 748 F.2d at 1263; Teresa Diane P., 744 F.2d at 491; Blazejewski v. Board of Education, 599 F. Supp. 975 (W.D.N.Y. 1985).[5]

[5]Even those Courts which do not address the attorney's fees issue squarely, support the proposition that the E.A.H.C.A. was not intended to preclude separate due process claims even though it does preclude separate equal protection claims. Manecke v. School Board of Pinellas County, 762 F.2d 912, 920 (11th Cir. 1985). See discussion supra. Austin v. Brown Local School District, 746 F.2d 1161, 1166 (6th Cir. 1984).

A. Smith supports an award of attorneys' fees when a special education plaintiff has had to resort to judicial relief to force education officials to provide him the procedural protections that were constitutionally due.

In Smith, this Court found that violations of the E.A.H.C.A. itself did not provide a basis for § 1983 jurisdiction, Smith, 104 S. Ct. at 3468 n. 11, and that similar claims of discrimination in provision of special education services in violation of the Equal Protection clause or § 504 of the Rehabilitation Act, also will not usually provide an appropriate basis for § 1983 jurisdiction and for a fee award under § 1988 in a special education case.[6] Id., 104 S. Ct. at 3468-70, 3471-74. The Court reasoned that

[6]Plaintiff made no equal protection claim, and did not pursue his Rehabilitation Act claim.

Congress placed the primary responsibility on the states to enforce the statute and devised a "comprehensive scheme" of procedures, without attorney's fees, to assure that enforcement:

> [T]he Act establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415. See also S. Rep. No. 94-168, at 11-12 (emphasizing the role of parental involvement in assuring that appropriate services are provided to a handicapped child.) Smith, 104 S. Ct. at 3468, citing Board of Education v. Rowley, 458 U.S. 176, 208-209 (1982).

On the other hand, the Court recognized that when state or local officials do not provide the procedural protections of that comprehensive scheme, a special

needs student may have a due process claim which would entitle him to attorney's fees, if successful:

> [U]nlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme. ... And, while Congress apparently has determined that local and state agencies should not be burdened with attorney's fees to litigants who succeed, through resort to the procedures outlined in the EHA, in requiring those agencies to provide free schooling, there is no indication that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they were constitutionally due. (emphasis supplied) Smith, 104 S. Ct. at 3470, n.17.

In other words, while adherence to the procedural protections provided by Congress in the EAHCA will shield an educational agency against attorneys' fees in most special education cases, failure or refusal to provide procedural protections leaves an EAHCA defendant

in the same position as any other civil rights defendant, i.e., liable for attorney's fees to a prevailing plaintiff who prosecutes a "substantial" due process claim, whether or not that claim was the basis of the judicial resolution or settlement. Rose, 748 F.2d at 1263. See Smith, 104 S. Ct. at 3466; Maher v. Gagne, 448 U.S. 122, 130-1 (1980); Blazejewski, 599 F. Supp. at 978-9.

In Smith this Court declined to award fees on one of plaintiff's due process claims relating to the independence of the hearing officer. The rationale was that the independent hearing officer claim involved an entirely different legal theory, based on different facts, and warranted entirely different relief than the claim on which plaintiff prevailed, i.e., which agency would pay for the

plaintiff's educational program. Smith, 104 S. Ct. at 3471. In contrast plaintiff's due process claim in this case was based on the same facts, relied on similar legal theories, and required the same relief as the one on which he prevailed. See discussion, infra.[7]

Although Smith did limit the availability of fees for special education plaintiffs, awards pursuant to 42 U.S.C. § 1988 are still appropriate for the prevailing plaintiffs who must resort to judicial proceedings to force education officials to provide them with the process which they are

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[7]In Smith itself this Court did not disturb the fee award made to plaintiff for work done on the preliminary injunction, even though the claim for continuing the status quo was available both as a constitutional claim and pursuant to the E.A.H.C.A., 20 U.S.C. § 1415(e)(3). See Smith, 104 S. Ct. at 3467. See also Rose, 748 F.2d at 1263-4.

constitutionally due. Smith, 104 S.Ct. at 3471 n.17. Teresa Diane P., 744 F.2d at 491; Rose, 748 F.2d at 1263; Stock II, 394 Mass. at 441, 476 N.E.2d at 212.[8]

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[8]The defendants' description of the analysis by the Eighth Circuit, the Fifth Circuit, and the Supreme Judicial Court of Massachusetts as "fallacious reasoning," Petition for Certiorari, 30, is at best hyperbole.

It is defendants who mistake the reasoning in Smith by claiming that both due process and equal protection claims are precluded by the E.A.H.C.A., Petition for Certiorari, 23-4, and by ignoring the assumption underlying the Court's preclusion analysis, i.e., that access to the procedures of the Act have assured that the substantive requirements of the Act are being adhered to. See Smith, 104 S. Ct. at 3468-70.

B. A fee award to plaintiff was appropriate under the Smith standard.

The facts of the Stock case provide a remarkably good example of the circumstances in which attorney's fees are warranted under the Smith analysis. The defendants violated virtually all the state and federal regulations designed to assure full parental involvement and adequate notice of a change in educational placement. Stock I, 392 Mass. at 211-212, 467 N.E.2d at 453-4. Moreover, they did so in circumstances that resulted in not just a change in placement, but complete termination of special education services for plaintiff. Id., 392 Mass. at 208, 467 N.E.2d at 452. Furthermore, it was not local school officials, but officials and agents of the Department of Education which failed to comply with

the comprehensive procedural scheme which the Department is partly responsible for devising and statutorily obliged to enforce, Id., 392 Mass. at 206-7, n.3; 212, n.11, 467 N.E.2d at 451 n.3, 454 n.11; see also 20 U.S.C. § 1412(6); G.L. c.15 §1M. Even when plaintiff made a final attempt to give defendants an opportunity to redress the procedural problems through the administrative hearing process, those efforts were rebuffed by the Department of Education. Stock II, 392 Mass. at 209, 467 N.E.2d at 452.

Nor is this a situation, as with the Smith plaintiff's independent hearing officer claim, where the constitutional claim involves distinctly different facts, legal theories, and relief. See Smith, 104 S. Ct. at 3471. Stock's due process claim used virtually

the same facts, relied on related legal theories, and warranted the same relief he received for the statutory claims on which he prevailed. Stock II, 394 Mass. at 441, 476 N.E.2d at 212.

This case meets the Smith criteria for attorney's fees because plaintiff Stock had to resort to judicial remedies to obtain adequate procedural protection. Smith, 104 S. Ct. at 3470-71 n.17. The Supreme Judicial Court determined that only through resort to judicial action was Stock afforded the opportunity to participate in the education decision-making process envisioned by the EAHCA. Stock II, 394 Mass. at 441, 476 N.E.2d at 212.

Finally, although the Supreme Judicial Court did not need to reach the constitutional due process claim, Stock I, 392 Mass. at 205 n. 12, 467 N.E.2d at 454 n. 12, it found that there

could be no serious dispute that Stock was a prevailing party with a substantial [9] unaddressed constitutional claim, which entitled him to fees. Stock II, 394 Mass. at 441, 467 N.E.2d, at 213. See Smith, supra, 104 S. Ct. at 3466 (Congress did not intend for the authority to award attorney's fees to be extinguished by the fact that the case was resolved on a related non-constitutional ground, citing Maher v. Gagne, 448 U.S., 122, 132 (1980)) Rose, 748 F.2d at 1263.

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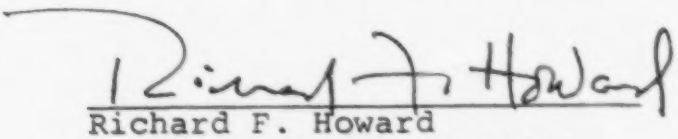
[9] Plaintiff had argued that public education is a "property interest" protected by the Due Process clause of the Fourteenth Amendment, Goss v. Lopez, 419 U.S. 565, 573-4 (1975) and that plaintiff and his parents were essentially excluded from the decision-making process and given no notice of their opportunity to challenge the complete termination of plaintiff's public education, and thereby denied due process.

Because plaintiff had to resort to judicial relief to secure the process to which he was constitutionally due, he was properly awarded attorney's fees pursuant to 42 U.S.C. § 1988.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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Counsel of Record

Dated: August 9, 1985

rights as guaranteed by Chapter 71B of the General Laws, and by 20 U.S.C. §1415.

2. That the Brayton High School diploma issued to Richard Stock be rescinded.

3. That the Department of Education shall take jurisdiction and hold a hearing, pursuant to G.L. c. 71B, §3 and 20 U.S.C. §1415(b)(2) on the matter of providing special education services to Stock. Should it determine that further services are appropriate, the Department shall take into account the period of about three years which has elapsed since the initial graduation in June, 1981. This time period shall be added to Stock's period of eligibility for special education services. Thus, he may receive such services beyond the normal termination age of twenty-two, although the

Department is not necessarily precluded from terminating Stock's special education services on some basis other than age. The Department may consider plans for services under G.L. c. 71B, §§12A-12C, inserted by St. 1983, c. 688.

4. The Superior Court shall retain jurisdiction of this matter to insure strict compliance with the procedural safeguards specified by G.L. c. 71B, §3, 20 U.S.C. §1415 and; 34 C.F.R. §§300.500-300.513.

s/s
William G. Young
Justice of the
Superior Court

Dated: October 31, 1984

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH,

At Boston, April 8, 1985.

In The Case No. SJC-3280

RICHARD STOCK

vs.

MASSACHUSETTS HOSPITAL SCHOOL & others

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 56190.

ORDERED, that the following entry be made in the docket; viz., --

The judge in the Superior Court is to determine the appropriate fee award. The plaintiff also is to have the costs of the appeals.

By the Court,

s/s [Jean M. Kennett] ,
Clerk.

April 8, 1985

See opinion on file.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
CIVIL ACTION NO. 56190

RICHARD STOCK, a mentally disabled person, by and through his next friend, JOSEPH STOCK,

PLAINTIFF,

V.

Massachusetts Hospital School, Massachusetts Department of Education, JOHN BRITT, as he is Superintendent of Massachusetts Hospital School, JOHN LAWSON, as he is Commissioner of the Department of Education, ROBERT POWERS, as he is the Director of the Bureau of Institutional Schools, and LORRAINE ATKIN, as she is Program Manager for the Brayton High School at the Massachusetts Hospital School,

DEFENDANTS

COMPLAINT

Introductory Statement

1. This is a civil action for declaratory and injunctive relief, enforcement

of state and federal special education statutes, G.L. c. 71B and the Education of All Handicapped Children Act (E.A.H.C.A., 20 U.S.C. s.1401 et seq.), s.504 of the Rehabilitation Act of 1973, 42 U.S.C. s.1983, and the Due Process protections of the Constitutions of the United States and of Massachusetts. Plaintiff requests declaratory and injunctive relief against state agencies and state officials who terminated special education services to Plaintiff by "graduating" him from the Massachusetts Hospital School without requisite procedural protections and despite plaintiff's lack of academic skills.

Jurisdiction

2. This Court has jurisdiction over the subject matter of this action

pursuant to G.L. c. 214 s.1 et seq., c. 231, ss.1-3, and c. 249, s.5.

Parties

3. Richard Stock is a twenty-year-old, multiply handicapped young man, who developed a brain tumor at age ten, is mildly mentally retarded, paraplegic, and has significant reasoning and comprehension deficits. He prosecutes this matter through his father and next friend, Joseph Stock.

4. The Massachusetts Hospital School is an institution for multiply disabled children in Canton, Massachusetts operated by the Department of Public Health. The Brayton High School is the school program at the Hospital School and is operated by a program manager who is jointly appointed by the superintendent

of the Hospital School and the Commissioner of Education.

5. The Massachusetts Department of Education is the State Education Agency which is charged with the responsibility of assuring implementation of G.L. c. 71B and the E.A.H.C.A. and which operates the school programs in various state institutions through its Bureau of Institutional Schools.

6. John Britt is the superintendent of the Massachusetts Hospital School and as such has the responsibility for the operation of the Hospital School program and has the joint responsibility to supervise the program manager for educational component of the Hospital School.

7. John Lawson is the Commissioner of the Department of Education and as such has overall responsibility for the

operation of the department, including the Bureau of Institutional Schools and the Bureau of Special Education Appeals within the division Special Education. He also jointly appoints the program manager for the school programs within the various state institutions.

8. Robert Powers is the Director of the Bureau of Institutional Schools (B.I.S.) of the Division of Special Education of the Massachusetts Department of Education. As director of the Bureau he has the authority and responsibility to supervise the B.I.S. program managers in the various institutions, to assure that appropriate special education services are provided according to state and federal law.

9. Lorraine Atkin is the program

manager at the Brayton High School of the Massachusetts Hospital School and is jointly appointed by the superintendent of the Hospital School and the Commissioner of Education. As such, she is responsible to insure that each special needs student at the Hospital School receive appropriate special education in compliance with federal and state law.

Facts

10. Plaintiff was diagnosed as having a brain tumor at age ten and since that time has had chemotherapy and radiation to his brain and spinal cord.

11. Due in part to the brain tumor and treatments for that tumor, plaintiff has developed significant deficits in reasoning and short-term memory as well

as motivation and behavior problems. Plaintiff also has substantial difficulty walking, even with leg braces, and usually must use a wheelchair.

12. Plaintiff was treated at Boston City Hospital, Newton-Wellesley Hospital, Kennedy Memorial Hospital, and entered the Massachusetts Hospital School in August of 1976 at age 14.

13. During his stay at the Hospital School, plaintiff received special education services at the Brayton High School program from staff employed by or under contract with the Massachusetts Department of Education.

14. At no time during plaintiff's stay at the Hospital School did representatives of the Wrentham Public Schools arrange or provide evaluations for plain-

tiff or participate in the development of his Individual Education Plan.

15. During plaintiff's stay at the Hospital School he has shown substantial impairment in memory, reasoning, and problem-solving ability and has failed to continue gaining information and skills.

16. During plaintiff's stay at the Hospital School, his tested Intelligence Quotient has declined.

17. In the fall of 1980, a group of teachers met and developed an Individual Education Plan for plaintiff for the 1980-81 school year.

18. Neither plaintiff nor his parents were present or invited to the meeting at which plaintiff's 1980-81 I.E.P. were developed.

19. No representatives of any state agency under the Executive Office of Human Services was invited to or participated in the meeting to devise plaintiff's 1980-81 I.E.P., nor did the chairperson of the Regional Interdepartmental Children's Project Team receive notification of or participate in the development of plaintiff's 1980-81 I.E.P.

20. Massachusetts Hospital School and Brayton High School officials knew at the time that plaintiff's 1980-81 I.E.P. was written, that they intended for plaintiff to receive a high school diploma at the end of the 1980-81 school year.

21. Plaintiff's 1980-81 I.E.P. indicated that it covered the period, September, 1980 to September 1981. Graduation was not mentioned in the I.E.P.

22. At no time were plaintiff's parents offered the opportunity to reject or accept the 1980-81 I.E.P., nor were they informed of their opportunity to decline graduation or challenge the graduation decision through the special education appeals process.

23. Plaintiff signed the 1980-81 I.E.P. himself on or about January 28, 1981. Upon information and belief, the matter of graduation was not explained to him at that time.

24. Even if the matter of graduation was discussed with plaintiff at the time he signed the I.E.P., defendant officials knew that plaintiff lacked the capacity to understand the implications of graduation.

25. Plaintiff was not informed of his opportunity to decline graduation or to challenge graduation through the special education appeals process.

26. Massachusetts Hospital School and Brayton High School officials were repeatedly advised by representatives of the Department of Mental Health and the Massachusetts Office for Children that appropriate services would not be available for plaintiff after graduation and that he should not graduate.

27. Plaintiff was presented with a Brayton High School diploma in June of 1981.

28. Since June of 1981, plaintiff has remained in residence at the Hospital School, but without special education services.

29. From January of 1982 to the present time plaintiff has participated in an evaluation program arranged by the Massachusetts Rehabilitation Commission. Plaintiff has been given repeated extensions of the initial sixteen-week evaluation period, but has not come close to the twenty-five percent production rate necessary to qualify for long-term M.R.C. services.

30. Plaintiff is operating at eight to fourteen percent (8-14%) production rate and is unlikely to achieve the necessary twenty-five percent production rate in the foreseeable future. Even if plaintiff did meet the required production rate, there would be a substantial wait before plaintiff would be able to enter M.R.C.'s long-term program.

31. When the Department of Mental

Health (D.M.H.) formally notified plaintiff in June of 1981 that they would not provide him with services, defendant Britt responded by notifying D.M.H., purportedly on plaintiff's behalf, that plaintiff would not exercise his right to appeal D.M.H.'s decision.

32. Massachusetts Hospital School and Brayton High School graduates in 1982 were given the opportunity to decline to graduate and continue receiving special education services.

33. Plaintiff has not attained those skills generally expected of a high school graduate by potential employers or institutions of higher learning.

34. Defendants have refused to give plaintiff the opportunity to return his diploma and to continue receiving special education services.

35. Plaintiff continues to need special education services and is now failing to gain and losing skills because of the lack of appropriate special education services.

36. At all times pertinent to these claims defendants have been acting under color of state law.

37. Defendant Massachusetts Hospital School intends to discharge plaintiff on or before September 10, 1982.

38. There is presently no available appropriate place for plaintiff to reside or to receive appropriate educational or training services unless special education funding is available.

39. Plaintiff would be irreparably harmed by discharge from the Massachusetts Hospital School without an alternative residential placement being made available.

Statement of Claims

COUNT I: G.L. c. 71B; E.A.H.C.A.

40. Defendants' failure to include plaintiff or his parents in the meeting which developed his 1980-81 Individual Education Plan (I.E.P.) violated their obligations, under G.L. c. 71B, and the Education of All Handicapped Children's Act, 20 U.S.C. S.1401 et. seq. (E.A.H.C.A.).

COUNT II: G.L. c. 71B; E.A.H.C.A.

41. Defendants' failure to specifically address graduation in the 1980-81 I.E.P. and to inform plaintiff and his parents of all program options available to them and of their right to decline graduation or challenge the graduation

decision through the administrative appeals process violated his rights under G.L. c. 71B and the E.A.H.C.A.

COUNT III: G.L. c. 71B

42. Defendants' failure to include representatives of agencies under the Executive Office of Human Services in the meeting to devise plaintiff's 1980-81 I.E.P. violated their obligations under G.L. c. 71B and regulations promulgated pursuant thereto.

COUNT IV: G.L. c. 71B; E.A.H.C.A.

43. Defendants' issuance of a high school diploma to a student who was not fully informed of the consequences of accepting that diploma, who was severely disabled and had substantial need of continuing special education services,

who had not reached his twenty-second birthday and who had not attained the skills generally expected of a high school graduate constitutes a violation of G.L. c. 71B and the E.A.H.C.A.

COUNT V: G.L. c. 71B; E.A.H.C.A.

44. The failure of the defendants, Massachusetts Department of Education, Lawson, Powers, and Atkin to insure that the Massachusetts Hospital School provide full educational opportunity to plaintiff, that plaintiff receive the maximum feasible benefit from special education services, and that the Massachusetts Hospital School complies with the requirements of state and federal special education laws constitutes a violation of G.L. c. 71B and the E.A.H.C.A.

COUNT VI: REHABILITATION ACT

45. Defendants' termination of special education services to plaintiff and issuance of a diploma to him despite his lack of academic skills and without fully informing him of the consequences of and options to graduation, constitute a violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. s.794.

COUNT VII: DUE PROCESS

46. Defendants' failure to fully inform plaintiff of the consequences of and options to graduation, failure to give plaintiff or his parents an opportunity to participate in the meeting when the graduation decision was made, and

defendants' failure to give plaintiff or his parents notice of and opportunity to challenge that decision constitute a violation of the Due Process protections of the Fourteenth Amendment to the United States Constitution and of the Declaration of Rights of the Massachusetts Constitution.

Prayers for Relief

WHEREFORE, plaintiff requests that this Court:

1. Issue a Preliminary Injunction:

   (a) Barring defendants from discharging plaintiff from the Massachusetts Hospital School until alternative appropriate day and residential placements are secured.

(b) Requiring defendants to forthwith take all steps necessary to assure that plaintiff receive appropriate residential and educational or training services.

2. After hearing on the merits enter judgment declaring that defendants' actions have violated their obligations and plaintiff's rights as described in Count I-VII.

3. Enter a permanent injunction requiring defendants, their agents, employees and successors to:

(a) Take all steps necessary to assure that plaintiff receives appropriate spe-

cial education services until his twenty-second birthday.

(b) Take all steps necessary to assure that plaintiff and his parents be given the opportunity to participate in development of his I.E.P. and each annual revision.

(c) Inform each potential graduate of the Brayton High School program and his or her parents, at the time the expected final I.E.P. is developed, of the consequences of and options to graduation, and that the student or parent may decline graduation

or challenge graduation through the special education appeals process.

4. Enter a permanent injunction requiring defendants, Massachusetts Department of Education, Lawson, and Powers to:

(a) Promulgate standards and regulations which assure that all B.I.S. programs will fully inform potential graduates and their families of the consequences of and options to graduation and which insure that B.I.S. programs not require students to graduate unless they have attained a level of skill generally expected

of high school graduates by employers and institutions of higher learning.

(b) Take steps necessary to assure that all B.I.S. programs give each student, his or her parents, the opportunity to participate in the development of that student's I.E.P. and that each student and parent be given a full explanation of their rights to free independent evaluations and to challenge the proposed I.E.P.

5. Award reasonable attorney's fees.

6. Grant such other relief as the Court deems proper.

PLAINTIFF,

By his attorney,

s/s
Richard F. Howard
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Dated: July 23, 1982

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Voice and TTY

June 29, 1984

Chief Justice Edward Hennessey
Supreme Judicial Court
New Courthouse
Pemberton Square
Boston, MA 02108

Re: Request for Award of Attorney's Fees
Stock v. Massachusetts Hospital School,
No. 56190

Dear Chief Justice Hennessey:

I write to you because Rule 27, M.R.A.P. requires that a Petition for Rehearing be presented by letter to you and because I have not been able to determine what other pleading is available to pursue my request. My request is for

an award of attorney's fees by this Court in the above case. I bring this matter to you to avoid being told by the Superior Court judge that your decision in Mellor v. Berman, 390 Mass. 275 (1983) prohibits him from awarding fees for my appellate work. I also believe that the Superior Court would appreciate your guidance on whether a fee award is appropriate in this case. I ask that you accept this request for an award of attorney's fees, whether or not I have chosen the appropriate procedural vehicle.

I am requesting an award of costs and attorney's fees to plaintiff pursuant to 42 U.S.C. §1988. The basis for this claim is that plaintiff-appellant's complaint included a non-frivolous constitutional claim pursuant to 42 U.S.C. §1983

and is therefore entitled to fees pursuant to the United States Supreme Court decision in Maher v. Gagne, 448 U.S. 122 (1980).

There are numerous federal court decisions awarding attorneys fees under similar circumstances in Education of All Handicapped Children Act cases, e.g., Monahan v. Nebraska, 687 F.2d. 1164 (8th Cir. 1982); Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982); Jose P. v. Ambach, 669 F.2d 865 (2nd Cir. 1982); Mattie T. v. Holladay, 522 F.Supp. 72 (N.D. Miss. 1981). The Court of Appeals for the First Circuit has declined to award attorneys fees in a special education case. Smith v. Cumberland School Committee, 703 F.2d. 4 (1st Cir. 1983), cert. granted sub nom, Smith v. Robinson, 104 S.Ct. 334 (1984). The Supreme Court has

heard argument on the Smith case and a decision is expected soon.

If argument would be necessary or helpful for the Court in its consideration of this matter, I respectfully request that the Court set a briefing schedule.

Thank you for your consideration.

Very truly yours,

s/s
Richard F. Howard
Attorney for Plaintiff-
Appellant,
Richard Stock

RFH:pb
cc: Judith Yogman, AAG